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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

IN THE MATTER OF THE PETITIONS OF UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S FOR EXONERATION FROM OR LIMITATION OF LIABILITY

JEAN E. COOK, Administratrix of the Estate of Charles H. Cook, Deceased,
Petitioner,
v.
UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Jean E. Cook prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which vacated the judgment of the District Court and remanded the cause for a redetermination of damages consistent with the rulings set forth in its opinion.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit have not yet been officially or unofficially reported but are set forth in the separate Appendix of Petitioner Lamp, pp. 43-88.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1970. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in vacating an award of prejudgment interest in a death case arising under the Jones Act, Death on the High Seas Act and general maritime law, where the liability of shipowners had been stipulated, but the determination of damages has already taken in excess of five years and is not yet completed?

2. Is a claimant in a death case arising under the Jones Act, Death on the High Seas Act and general maritime law, entitled to have the value of her award for future damages increased to compensate her for the incursions of future inflation into the purchasing power of her award, where expert witnesses for both sides testified that inflation is a permanent trend in this country but differed only in the rate of inflation which they predicted?

3. Did the Court of Appeals err in disallowing various elements of claimant's award because, in effect, claimant was unable to prove to a mathematical certainty the exact amount of her damages, even though the fact of damage, i.e. liability, had been stipulated?

STATUTES INVOLVED

The Jones Act

46 U.S.C. § 688:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Death on the High Seas Act

46 U.S.C. § 761:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 762:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be appointed among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Federal Employers' Liability Act

45 U.S.C. § 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 59:

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

STATEMENT OF THE CASE

The instant case arises from the sinking of the *Cedarville,* owned by United States Steel Corporation, hereinafter referred to as United States Steel, following its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske Amerikalinje, hereinafter referred to as Den Norske, on May 7, 1965 in the Straits of Mackinac. Petitioner Jean E. Cook is the Administratrix of the estate of Charles H. Cook, one of the ten members of the Cedarville crew who lost their lives as the result of the collision.

Various proceedings were pursued in the courts below which are summarized in the Opinon of the Court of Appeals. (See Appendix of Petitioner Lamp, pp. 43-46.) However, for purposes of this review, it is only necessary to know that the issue of compensatory damages was referred by the District Court to two Commissioners upon a stipulation of liability on the part of the ship owners. Extensive hearings were held by the Commissioners and they in turn filed their awards and opinions for the various claimants. (For the full text of these awards and opinions, see Appendix of Petitioner Lamp, pp. 1-36.) The Commissioners' findings of fact and law together with the award of $194,491.00 to Petitioner Jean E. Cook were adopted *in toto* by the District Court. (See Appendix of Petitioner Lamp, pp. 37-42.)

On appeal, the Court of Appeals found various items of damages to have been computed erroneously and consequently vacated the judgments of the District Court and remanded the cause for further proceedings. (For the opinion of the Court of Appeals, see Appendix of Petitioner Lamp, pp. 43-87.) Petitioner Cook seeks review herein of several critical issues which she contends were erroneously decided by the Court below.

Inasmuch as this case involves rights arising under the Jones Act, 46 U.S.C. §688, Death on the High Seas Act, 46 U.S.C. §761-2, and under general federal maritime law the basis for federal jurisdiction in the court of first instance was 28 U.S.C. §1331 and 46 U.S.C. §§688, 761.

REASONS FOR GRANTING THE WRIT

1. DID THE COURT OF APPEALS ERR IN VACATING AN AWARD OF PRE-JUDGMENT INTEREST IN A DEATH CASE ARISING UNDER THE JONES ACT, DEATH ON THE HIGH SEAS ACT, AND GENERAL MARITIME LAW, WHERE THE LIABILITY OF SHIPOWNERS HAD BEEN STIPULATED, BUT THE DETERMINATION OF DAMAGES HAS ALREADY TAKEN IN EXCESS OF FIVE YEARS AND IS NOT YET COMPLETED?

The shipwreck and the loss of the life of petitioner's decedent occurred on May 7, 1965. The liability for compensatory damages of the shipowners had been stipulated shortly thereafter. To date, almost six years later, petitioner has not received one penny of the damages to which all parties concede she is entitled.

The District Court held that a debt due on the date of death is payable on that date and, if not then paid, should bear interest until it is paid in order to compensate the injured party more fairly and to stimulate the parties to proceed as expeditiously as possible in the litigation. Consequently, the court awarded pre-judgment interest at the rate of 5% per annum. It noted the apparent split of authority in the various circuits, citing *Cleveland Tankers, v. Tierney,* 169 F. 2d 622 (6th Cir. 1948), which denied prejudgment interest, and the more recent cases of *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583, 592-95 (2d Cir. 1961) *(The Mormackite),* and *Petition of Marina Mercante Nicaraguense, S.A.,* 364 F. 2d 118 (2d Cir. 1966), 248 F. Supp. 15 (D.C.N.Y. 1965) (*The El Salvador*) which granted such interest.

Even if prejudgment interest may not be appropriate in all cases, especially those where the issues of liability are

seriously in question, clearly in a case like the instant one, a stipulation of liability should carry with it an obligation to pay pre-judgment interest. The award of such interest by the District Court is in line with authority from other Circuits and from the vast majority of other jurisdictions. Consequently, Petitioner Cook urges that the District Court's award of 5% pre-judgment interest be reinstated.

2. IS A CLAIMANT IN A DEATH CASE ARISING UNDER THE JONES ACT, DEATH ON THE HIGH SEAS ACT AND GENERAL MARITIME LAW, ENTITLED TO HAVE THE VALUE OF HER AWARD FOR FUTURE DAMAGES INCREASED TO COMPENSATE HER FOR THE INCURSIONS OF FUTURE INFLATION INTO THE PURCHASING POWER OF HER AWARD, WHERE EXPERT WITNESSES FOR BOTH SIDES TESTIFIED THAT INFLATION IS A PERMANENT TREND IN THIS COUNTRY BUT DIFFERED ONLY IN THE RATE OF INFLATION WHICH THEY PREDICTED?

The District Court, adopting the findings of fact of the Commissioners, held that inflationary trends in this country would continue into the future, resulting in a loss in the purchasing power of the dollar by 4% per annum. Consequently, the Court held that the discount of future damages to present value at a rate of 4% simple interest should be offset by the 4% inflationary trend which would reduce the value of such award into the future. The decision to take into account the effects of future inflation was based on the testimony of experts offered by both sides. Each testified that inflation was a more or less permanent trend in this country, they differed only to the extent to which the rate of inflation could be predicted. By the introduction of such testimony, both sides in effect conceded that the question of inflation and the rate thereof

was an issue of fact to be decided on the basis of testimony offered in support of their respective positions.

The District Court viewed this issue in exactly that manner. The question was not whether a loss would occur due to inflation, but rather how much of a loss. The Court referred to the 4.8% rise in consumer prices in 1968 (which rate incidentally rose to 6.1% in 1969 and presumably even higher in 1970) and decided that "the 4% non-compounded rate of increase appears reasonable". Thus, on the basis of the factual evidence in the record and the virtual agreement of the experts as to the propriety of considering the inflationary effects upon the award, the Court's ultimate decision on this fact is supported by the record and is not clearly erroneous.

However, the Court of Appeals reversed the District Court on this issue and held that in the Sixth Circuit the prospect of a future decline in the purchasing power of a dollar may not be used to offset the reduction to present value, citing *Sleeman v. Chesapeake & Ohio R.R. Co.*, 414 F. 2d 305 (6th Cir. 1969). Research has disclosed no other cases in the federal system which have dealt with this particular issue. However, the continuing threat of inflation, with its devasting effect on fixed incomes, is and has been an everpresent political, social and economic problem of this country. To ignore the existence of this element of the economic future is simply to avoid one of the most pressing problems this country faces today and will continue to face far into the future. It is grossly unfair to expect petitioner Cook, who has already suffered the loss of her husband to bear the full brunt of loss occasioned by future inflation, where all parties to this litigation agree that such inflation is relatively certain to occur and in an amount which will be harmful to her economic position.

Although the District Court calculated both the reduction to present worth and the rate of future inflation at a simple rate of 4% per annum, the Court of Appeals held in Footnote 11 that such rate should be compounded in accordance with generally accepted actuarial principles. Accordingly, petitioner Cook contends that the rate of 4% per annum for future inflationary trends should also be calculated in a compound rather than a simple way inasmuch as the effects of these two aspects of the economy are complementary and must be applied in the same manner.

Accordingly, Petitioner Cook urges this court to decide an important question of federal law which has not been but should be settled by this Court and consequently to reinstate that portion of the District Court's opinion which offsets the reduction of future damages to present value by the certainty of a future decline in the purchasing power of the dollar.

3. DID THE COURT OF APPEALS ERR IN DISALLOWING VARIOUS ELEMENTS OF CLAIMANT'S AWARD BECAUSE. IN EFFECT, CLAIMANT WAS UNABLE TO PROVE TO A MATHEMATICAL CERTAINTY THE EXACT AMOUNT OF HER DAMAGES, EVEN THOUGH THE FACT OF DAMAGE, I.E. LIABILITY, HAS BEEN STIPULATED?

At noted above, the life of Charles H. Cook was lost in a shipwreck on May 7, 1965. As administratrix of his estate, Petitioner Cook is entitled to receive compensation from the shipowners for the pecuniary loss which she and her minor child suffered. There are many items of damage which combine to make up the entire loss for which petitioner Cook is entitled to compensation. The question arises, however, whether she is required to prove these

items of damages to a mathematical certainty or, in the event she fails to do so, to be deprived totally of compensation for these aspects of her loss. The landmark decision of *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) laid down the basic rule as follows:

> It is true that there was uncertainty as to the extent of the damage but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in the respect of their amount.

Petitioner Cook contends that the Court of Appeals erred in several respects by requiring her to sustain an unreasonable burden of proof in presenting her claim for damages on several different kinds of items. In addition to the items of pre-judgment interest and an offset for future inflation, discussed *supra*, the Court of Appeals also reduced Petitioner Cook's award in several other respects. For example, the Court of Appeals held that the earnings base upon which the Commissioner's computed earning capacity loss was clearly erroneous, and substituted its own yardstick, i.e., that the earnings base must be computed upon the higher of two bases: (1) the year immediately preceding the accident or (2) the average of the four years preceding it. The Commissioners had found, as a basis for its determination, that the highest of the decedent's annual earnings during the five years prior to the accident, was fair. However, with respect to peti-

tioner Cook's decedent, even this more generous formula was inadequate in that Mr. Cook had been promoted shortly prior to the accident and hence his previous earnings would not reflect what his potential earnings would be. Nevertheless, to require an earning base to be calculated on an arbitrary fomulation by the Court of Appeals not only invades the province of the fact finder, but holds claimant to an unreasonable burden of proof.

Similarly, the Court of Appeals reduced the Commissioners' award for pre-judgment productivity increases on earnings from the original 4-5% to 1½% per annum. The Commissioners had based their award on expert testimony that all wages tend to increase 5 to 6% annually. However, the Court of Appeals found that decedent's union contract only provided for an annual increase of 1½% and used this extremely low figure as a virtual ceiling on projected productivity increases. The record shows that Mr. Cook had never felt compelled to continue employment with respondent United States Steel, and in fact on several occasions had undertaken to run his own separate business. There is no reason to hold Mr. Cook's projected pre-judgment productivity increase to an amount that is considerably below the national average on the unfounded assumption that he would have continued in the employ of United State Steel. The Commissioners' findings in this respect were supported by the record and should have been sustained.

Similarly, the Court of Appeals vacated the Commissioners' award for care and counsel to decedent's widow on the grounds that *Michigan Central R.R. Co. v. Vreeland,* 227 U.S. 59 (1912) only permits an award of damages to widows for loss of care, counsel and guidance where "specific evidence of both the nature of the services

lost and the cost of obtaining such services elsewhere" is introduced. The Court went on as follows:

> We believe *(Vreeland)* must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care and guidance of counsel which the decedents gave to their wives prior to their deaths which could only be supplied by the service of another for compensation, much less any showing that any such care or counsel had any pecuniary value. (At page 35-36)

Contrary to that statement, however, the record is replete with examples of decedent Cook's efforts at providing counsel, care and guidance to his wife during his lifetime. Naturally, a substantial portion of these services flowed from the love and devotion which he felt towards his wife. However, it is obvious that his widow will have to seek such services elsewhere and at a financial cost. Inasmuch as it is impossible for petitioner Cook to prove with mathematical certainty the actual cost of replacing every kind of care, guidance and counsel which her husband would have rendered to her had he lieved, it seems clear that the impact of *Story Parchment* requires the Court to sustain the modest award of $8,000 to compensate her for this element of her loss.

The thrust of *Story Parchment* is to provide compensation for injured parties even as to those elements of damage which cannot be proved to a mathematical certainty. The policy behind that decision is to require the wrongdoer to shoulder his burden of compensation without hiding behind unreasonable obstacles placed in the way of a claimant's proofs. Petitioner Cook contends that the deci-

sion of the Court of Appeals vacating her award in several critical respects requires *her* rather than the shipowners to bear the burden of proving the exact value of future losses which, by their very nature cannot be determined with exactitude. Although her loss can never be fully compensated for in money, she should not be deprived of any portion of her award which is supported by the record to the extent such proof is reasonably obtainable. Accordingly, petitioner Cook urges this Court to review this case in the light of *Story Parchment* and to reinstate her award to the extent required by that decision.

CONCLUSION

For the foregoing reasons, petition Cook urges this Court to grant the Petition for Writ of Certiorari so that the decision of the Court of Appeals may be reversed and the award of the District Court may be reinstated.

Respectfully submitted,

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